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No. 00-1051

IN THE

Supreme Court of the United States

THE COLEMAN COMPANY, INC.,

Petitioner,

v.

GERALD E. BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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Rule:

AAA Employment Disputes Rule 34(d) 10

STATEMENT OF THE CASE

It is undisputed that The Coleman Company, Inc. ("Coleman") wrongfully terminated Gerald E. Brown ("Brown"), breaching their employment contract and defaming him in the process. As a result, a three member panel of arbitrators awarded Brown $3,617,930. Approximately $2.3 million of that award was for the value of Brown's stock options which he could have exercised a short time after the wrongful termination. The panel justified this portion of the award on two grounds: (1) an interpretation of the contract, pursuant to which the panel found that Brown had never been properly terminated, for cause or not for cause, and therefore, should have been able to exercise his stock options during a subsequent change in control of the company; and (2) invocation of a principle of equity, whereby Coleman should be prevented from being unjustly enriched by its own wrongful conduct. The District Court for the District of Kansas confirmed two portions of the panel's award to Brown, vacating only the portion relating to Brown's stock options. In vacating the stock options award, the District Court substituted its judgment for that of the arbitrators. The Court of Appeals for the Tenth Circuit reversed the District Court's vacatur of the stock options award, specifically finding that: (1) the arbitration panel had interpreted the contract in constructing its award, and thus, the District Court could not overturn the award even if it disagreed with that interpretation; and (2) under the rules Coleman chose in drafting Brown's employment contract, the arbitrators also had sufficient equitable powers to make the award they had entered.

REASONS FOR DENYING THE WRIT

The writ should be denied because the Tenth Circuit's opinion does not raise the question that petitioner claims is present. Instead, petitioner mischaracterizes the Tenth Circuit's opinion in an attempt to manufacture some reason for this Honorable Court to take up their petition. The Tenth Circuit *did not* hold that the arbitrators could or did "reject the express terms of the governing contract in favor of relief that comports with their own personal sense of justice." Pet. at (i). This language is totally manufactured by the petitioner, is nowhere to be found in the Tenth Circuit's opinion, and does not comport with the Tenth Circuit's express findings.

Further, the question presented by the petitioner challenges only one of two explicit bases for the Tenth Circuit's decision. Thus, even if this Honorable Court should take up the petition and issue a ruling in petitioner's favor, the Tenth Circuit's decision could stand on the alternative ground not challenged herein.

Finally, the Tenth Circuit's opinion does not have a chilling effect on future arbitrations or business arrangements, nor does it conflict with decisions in the Sixth or Third Circuits, as petitioner maintains. The only basis that petitioner asserts for these potential effects is the petitioner's own mischaracterization of the Tenth Circuit's opinion. A plain reading of the Tenth Circuit's opinion demonstrates the fallacy of petitioner's request and confirms that the Tenth Circuit's opinion did not create any conflict of authority. For all of these reasons, the petition should be denied.

I. COLEMAN'S BRIEF MISCHARACTERIZES AND MISSTATES THE TENTH CIRCUIT'S OPINION

Under a heading in its opinion entitled "A. Interpretation of the Contract," Pet., App. A at 5a, the Tenth Circuit correctly held that:

> **The arbitration panel interpreted the contract in making this award** . . . how the district court would have interpreted the contract is not at issue. Because **the $2,322,335 stock options award was based on the contract,** the panel's decision must be confirmed and the district court reversed.

Pet., App. A at 7a. After finding the arbitrators had reviewed and expressly construed the contract at issue, the Tenth Circuit cited an additional, alternative ground for the arbitration award: principles of equity. In a separate section of its opinion, entitled "B. Equity," the Tenth Circuit stated:

> Further, this Court now determines the panel's decision **also** was justified under its powers to provide an equitable remedy.

Id. Each of the two holdings doom Coleman's petition. Coleman's petition, however, is based entirely on the second alternative — the equity holding. Coleman completely ignores the first alternative — the "Interpretation of the Contract" holding. This is a fatal flaw.

A. Coleman Waived Its Right To Review By Not Challenging The Independent Contract Interpretation Ruling.

By not seeking review of the first independent basis for the Tenth Circuit's ruling, interpretation of the contract, Coleman waived any challenge thereto. *Moncrief v. Williston Basin Interstate Pipeline Co.*, 174 F.3d 1150, 1155 (10th Cir. 1999). Thus, even if this Court were to address, for the sake of argument, the "Equity" reasoning challenged by Coleman, the Tenth Circuit's judgment would stand because the stock option damages are wholly supported by the Tenth Circuit's unchallenged "Interpretation of the Contract" holding. For this reason alone, Coleman's petition should be denied.

Second, as demonstrated below, the Tenth Circuit's contract holding completely undermines Coleman's mischaracterization of the Tenth Circuit's opinion and demonstrates the fallacy of the purported "Question Presented" by Coleman. Coleman obviously chose to ignore the explicit language in the Tenth Circuit's ruling, which found the arbitrators were construing the contract, because that language undermines its flawed petition.

B. Coleman's Petition Repeatedly Misstates and Mischaracterizes The Tenth Circuit's Opinion And Possible Effect.

1. Coleman's "Question Presented" Is Erroneous.

Coleman attempts to overturn the Tenth Circuit's opinion by completely misstating what the court held. The primary misstatement by Coleman — that the Tenth Circuit found it was permissible to completely disregard the contract to fashion an equitable remedy — appears first in the "Question Presented" by Coleman. Coleman erroneously told this Court that a legitimate question existed as to:

> Whether the Tenth Circuit erred in holding that a provision in the rules of the American Arbitration Association . . . empowers arbitrators to reject the express terms of the governing contract in favor of relief that comports with their own personal sense of justice . . .[1]

Pet. at (i). As is apparent from the lack of any citations within the petition to any language in the Tenth Circuit's opinion supporting Coleman's fabricated question, the petition is without any legitimate basis. First, the Tenth Circuit never

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1. Coleman repeats this misstatement throughout its petition. *See, e.g.*, "The court determined [the rule] . . . enabled the arbitrators to reject the express terms of the contract . . .", Pet. at 9; "The Tenth Circuit . . . held that the arbitrators disregard of the contract was justified . . .", Pet. at 2; ". . . to hold that the arbitrators' power to fashion 'just and equitable' relief authorizes them to defy the express provisions of the contract." Pet. at 16. Coleman cites no supporting language in the Tenth Circuit's opinion for these statements; none exists.

held that any rule "empowers arbitrators to reject the express terms of the governing contract . . .". This language is nowhere in the opinion. Nor did the Tenth Circuit ever find the relief granted by the arbitrators was expressly barred by the contract. Instead, the Tenth Circuit explicitly found to the contrary, noting: "The arbitration panel interpreted the contract in making this award." Pet., App. A at 7a. The Tenth Circuit also correctly cited this Court's controlling authority in finding:

> Brown and Coleman contracted for the arbitrator's construction of the contract not a judge's construction. See Enterprise Wheel, 363 U.S. at 599, 80 S.Ct. 1358 (stating "the courts have no business overruling [the arbitrator] because their interpretation of the contract is different from his.")

Pet., App. A at 6a. Further, the Tenth Circuit cited the well-settled law that " 'a court may not overturn an arbitrator's decision even where error has been committed.' *NCR Corp. v. District Lodge No. 70*, 906 F.2d 1499, 1504 (citing *United Paperworkers Int'l Union, AFL-CIO, v. Misco*, 484 U.S. 29, 37-40, S.Ct. 364, 98 L. Ed. 2d 296 (1987))."

In short, Coleman's position is not based on the actual language or holdings of the Tenth Circuit's opinion. Nor could it be, because the Tenth Circuit explicitly followed this Court's prior rulings. *See, e.g.*, Pet., App. A at 5a–6a. Coleman's petition is without merit.

2. Coleman Dramatically Misstates The Effect Of The Tenth Circuit's Opinion On Future Cases.

Again ignoring the plain language of the opinion, Coleman erroneously claims the judgment will have a chilling effect on future arbitrations because "parties cannot control or limit by the express terms of their contracts the remedies that the arbitrators may award. . . ." Pet. at 11; *see also* Pet. at 18. This statement is simply wrong.

The Tenth Circuit squarely addressed this issue when it noted the undisputed fact that:

> Coleman drafted Brown's employment contract, and thus, chose the rules of arbitration that would be used to settle the disputes. Coleman was not bound to choose rules that provided such broad power to the arbitrator to grant equitable relief, however, having chosen the rules of arbitration, Coleman is now bound by those rules.

Pet., App. A at 18a. In other words, Coleman lost the case under the rules Coleman chose. As the sole drafter of the contract, Coleman could have excluded equitable remedies, chosen different rules or created unique, limited and specific remedies. Nothing precluded the parties from choosing different rules or carving out certain remedies, as parties frequently do when contracting. Nor did anything mandate that Coleman choose to utilize the rules of the American Arbitration Association. But having made its choice in the employment contract, Coleman must now accept the consequences. The arbitrators operated under the contract Coleman drafted.

C. Coleman Mischaracterizes the Tenth Circuit's Opinion in an Attempt to Manufacture a Split of Authority.

Petitioner argues that the Tenth Circuit's opinion in this case conflicts with decisions from other circuits, *Wyandot, Inc. v. Local 227*, 205 F.3d 922 (6th Cir. 2000), and *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125 (3d Cir. 1972). Petitioner's argument is without merit for two reasons. First, the argument is premised on the same mischaracterization that pervades all of its petition — that the Tenth Circuit's opinion authorizes arbitrators to completely disregard the express terms of the contract when creating an award. Pet. at 11. Second, neither *Wyandot* nor *Swift* conflicts with the Tenth Circuit's decision; rather both cases are factually distinguishable from this case presented below.

In *Wyandot*, a discharged employee filed a notice of grievance more than twelve days after the last date on which she could file a notice of grievance under the collective bargaining agreement. 200 F.2d at 925. The arbitrator expressly found that the notice was untimely under the contract, and yet determined that the grievance was arbitrable. *Id.* at 926. In so finding, the arbitrator did not rely on any provisions in the contract or attempt to interpret contract provisions in any way. Rather, the arbitrator relied, without explanation, on a letter from the union indicating that it intended to submit the untimely grievance to arbitration, apparently as providing sufficient notice of the grievance to the company. *Id.* Thus, the arbitrator there lacked authority to even hear the dispute. No such issue was ever raised by Coleman here. Nor was the ruling in *Wyandot* separately supported by an independent contract interpretation ruling, as there is in this case.

Here, by contrast, the panel looked to the express terms of the contract in deciding that Brown's termination was tantamount to "no termination at all," and, therefore, Brown was able to recover the value of the stock options he would have exercised but for Coleman's wrongful conduct. Pet., App. A at 6a. The panel here did not, as petitioner asserts, extend the exercise period beyond one prescribed by the contract after a proper termination. Pet. at 15. Rather, the panel found that Brown was never properly terminated under the contract's termination clauses.

> The arbitration panel found Coleman had failed to properly terminate Brown for cause under paragraph 5(c) of the contract. Further, Coleman did not meet the requirements for terminating Brown without cause under paragraph 5(f) because proper notice was never given as required by paragraph 5(g). . . . Thus, Coleman's actions were "tantamount to no termination at all."

Pet., App. A at 6a. As this quote demonstrates, the arbitrators clearly applied the specific provisions of the contract when formulating their decision, as correctly noted by the Tenth Circuit. Moreover, the panel's alternative, equitable ruling was soundly based in the broad equitable powers given to the panel by the contract drafted by Coleman, specifically AAA Employment Disputes Rule 34(d).

In *Swift*, an agreement between the parties provided that the defendant would pay plaintiff in cash an amount equal to all losses, liabilities and expenses incurred or suffered by plaintiff in the event of a breach of warranty. 466 F.2d at 1127. The agreement also provided that disputes were to be governed by American Arbitration Association Commercial

Arbitration Rules which provided that the arbitrator could grant any remedy he deemed just and equitable *and* within the scope of the agreement between the parties. *Id.* at 1129. Swift demanded arbitration on a claim for breach of warranty triggered by a potential tax liability that was pending before the tax court. *Id.* at 1127-28. The arbitrator's award required Botany to deliver a six million dollar cash bond to Swift to cover any potential tax liability. *Id.* at 1128. That award was vacated, and the Sixth Circuit affirmed, on the basis that the award was beyond the scope of the agreement. *Id.* at 1132-33. The court held that the agreement called for the payment in cash for any existing liability and did not provide for the posting of security for potential liabilities. *Id.*

Again, the Tenth Circuit's ruling here creates no conflict with *Swift*. First, as noted by the Tenth Circuit, it is undisputed that the applicable rule in this case, AAA Employment Disputes Rule 34(d), provided broader equitable powers to the arbitrators than was the case in *Swift*. Second, the award here did not contradict the express terms of the contract as the panel determined that Brown was never properly terminated by Coleman.

Thus, Coleman's attempt to suggest a split among the circuits must fail. Notwithstanding petitioner's numerous mischaracterizations, the Tenth Circuit's opinion is not in conflict with *Swift* and *Wyandot*, which are factually distinguishable and were decided under different rules. Moreover, in rendering its decision, the Tenth Circuit faithfully applied the case-law and principles well-established by authorities issued by this Court. Pet., App. A at 5a-6a.

CONCLUSION

For all of the foregoing reasons, this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

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